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No. 86-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY, and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S., INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In reply to the respondents' briefs in opposition, the petitioners state as follows:

1. The respondents' arguments serve to augment the substantiality and controversial nature of the issue before this Court

The central issue decided by the Mississippi Supreme Court is whether, at the time of statehood in 1817, the "tidally influenced non-navigable waters were included in the state owned public trsut." Pet. App. 9a. In giving an affirmative answer, the Mississippi court acknowledges that "we find no federal case expressly deciding this point of federal law." Pet. App. 9a. Accordingly it is forced to

express "our view that, as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability." Pet. App. 10a.

The respondents ignore the lack of any direct federal precedent on this federal issue. Instead, they try to do what the Mississippi court could not do. They try to find federal precedents that are in point and that demonstrate that the Mississippi ruling is eminently correct and "consistent with the prior decisions of this Court." See Mississippi Br. Opp. 3-18; Saga Br. Opp. 3-18. This effort does not succeed. The respondents' arguments, many of which are contestable if not flawed, simply do not respond to the Mississippi court's inability to find federal precedents. And certainly such arguments do not destroy the "certworthiness" of this case. They do not alter the fact that the Mississippi Supreme Court has created an unprecedented expansion of the public trust doctrine to encompass all non-navigable but tidally influenced waters in the uplands of a coastal state. In short, the respondents have succeeded only in adding additional fuel to the on-going controversy over the historical and conceptual elements of the public trust doctrine.

One thing is crystal clear in the opinion below. The Mississippi court has crafted an expansion of the public trust doctrine by accepting, as a matter of federal law, the "ebb and flow" test as one means for determining the boundaries of public trust wetlands. It has done so by exploiting an unusual kind of ambiguity in the precedents of this Court, such as *McGilvra* v. *Ross*, 215 U.S. 70, 78 (1909), indicating that the "ebb and flow" test "has had no place in American jurisprudence since the decision in the

case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443 (1851)."

The theory of the court below is that, when Mississippi entered the Union in 1817, such terms as "tidewaters," "ebb and flow of the tide" and similar language "dominated discussions of the trust." Pet. App. 9a. No documentation or citation of those "discussions" is given; nor is any decision of this Court cited. From those "discussions" the Mississippi court draws the conclusion that the State of Mississipi must have acquried public trust domination in 1817 as to all lands submerged under the ebb and flow of the tide – without regard to navigability. *Id.*

The court below acknowledges that this Court, sometime after 1817, engaged in what is said to be a "complete redefinition of the geographical scope of the trust. *Id.* That "complete redefinition" process included a rejection of the "ebb and flow" test in favor of the "navigability in fact" test. As expressed in *McGilvra* v. *Ross,* 215 U.S. 70, 78 (1909), the "ebb and flow" test "has had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443 (1851)." But, in the view of the court below, that rejection of the "ebb and flow" test simply came too late to remove from the Mississippi public trust the "ebb and flow" properties that allegedly had vested in 1817.

The ultimate questions that arise out of the Mississippi court's analysis of federal decisional law respecting the "ebb and flow" test are basically two in number:

(1) Did the public trust doctrine, as a matter of federal law in 1817, encompass non-navigable "ebb and flow" wetlands that existed in Mississippi when it entered the Union?

(2) Does this Court's subsequent historical analysis of the "ebb and flow" test and its statement that the test "has had no place in American jurisprudence" at least since *The Genesee Chief* decision in 1851 mean

(a) that the "ebb and flow" test never had a place in the federal public trust jurisprudence, or

(b) that the rejection of that test operates retroactively as well as prospectively, or

(c) that the test was in place in 1817, when Mississippi entered the Union?

The answers to those questions will determine the outcome of central Question Presented to this Court by the petitioners: "Whether, at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust."

This problem is both important and difficult. It cannot be and should not be resolvable on the certiorari papers alone. At best, the opposing briefs of the respondents can only add to the importance of the problem and the appropriateness of granting certiorari to resolve this difficult and novel question.

The appropriateness of granting review is further augmented by the fact that the decision of the Mississippi Supreme Court in this case is the first appellate attempt to redefine federal law, or at least early federal law, so as to confer public trust dominion over non-navigable tidally influenced wetlands on on those states who joined the Union during that early period. Left unreviewed, the decision below might also have serious implications for states later admitted under the equal footing doctrine. Such a

drastic revision of the public trust doctrine clearly merits the attention of this Court.

The opinion below is well-written and thus may be influential in stirring up litigation in other states. Most states assert dominion only over navigable wetlands, having followed this Court's repudiation of the "ebb and flow" test. Some of those states, inspired by Mississippi's effort, may now seek to assert dominion over non-navigable wetlands that may have been tidally influenced when they entered the Union. Countless long-held land titles might be disrupted. And courts might be inundated with quiet title lawsuits, to say nothing of other legal relationships that might be impaired. All of which bespeaks the need for plenary review of the problem by this Court.

2. The "toothpick" test of navigability has no place in the federal public trust jurisprudence

The Mississippi court purports to establish, as an element of federal law, a theoretical toothpick under sail on the ebb and flow of the tide as a means of measuring "the inland boundaries we consider the United States set for the properties granted the State in trust." Pet. App. 12a. Neither the court nor the respodents make any claim that such a "toothpick" test finds any precedent in, or is consistent with, the decisions of this Court.

But the State of Mississippi does assert (Br. Opp. 29) that the "toothpick" test is a "simple, graphic illustration" of how the boundaries of public trust lands can be determined without the use of "any expensive and complicated survey techniques." Such an astounding statement is belied by the last paragraph of the opinion below. Pet. App. 26a. The Mississippi court there remanded the case to the Chancery Court to establish "the precise outer boundaries

of the public trust properties – today." This task, said the court, "will necessarily involve an interaction between counsel, surveyors and other experts, and the court." No mention is made in this passage about interaction with toothpicks under sail. The preliminary surveys that have been made have been prolonged and expensive, certainly at a cost in excess of the price of a six-pack of toothpicks.

As the *amicus* brief filed herein by Mr. Longino points out (p. 4), use of the Mississippi court's "toothpick" approach "would extend the public trust doctrine even to the most microscopic and temporary inlet." Such an extension would only compound the devastating impact on land owners, compelling them to employ expensive techniques to determine "the precise outer boundaries" of the extended public trust properties that are navigable only by a toothpick.

Needless to say, the respondents do not say that toothpicks can be used to establish public trust boundaries as of 1817, which is the only relevant period for determining what public trust lands were acquired by Mississippi at statehood. Not even the Mississippi Supreme Court has given thought to how that monumental historical-geophysical task can be performed.

3. The state courts below have established that petitioners' land title claims are traceable to early Spanish land grants

The State of Mississippi asserts at some length (Br. Opp. 7-11) that the land title claims of the petitioners' predecessors are based not upon early Spanish land grants as confirmed by Congress but upon "settlement and occupation of the land prior to 1813." The State attaches as an appendix to this brief certain public land records to sup-

port this assertion, although no statement is made that these records are part of the record in this case. Br. Opp. 1a-15a.

It is not clear why this matter is raised by the State, for the source of petitioners' land title claims is not directly in issue before this Court. Suffice it to say, however, that findings of fact by state courts, particularly in a land title dispute involving no federal constitutional problem, are given great if not conclusive weight by this Court. See, *e.g.*, *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952). Here, in affirming the Chancery Court's findings in this regard (Pet. App. 39a-41a), the Mississippi Supreme Court found (Pet. App. 2a):

> Cinque Bambini and others are vested with record title, derived from pre-statehood Spanish land grants said to date back to April 15, 1813 and to have been expressly confirmed by Acts of Congress, and from federal and state patents.

CONCLUSION

For these additional reasons, including those advanced by the *amicus* Mr. Longino and incorporated herein by reference, the petition for writ of certiorari should be granted.

Respectfully submitted,

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